A

Sundram v Arujunan & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-200 OF 1991

B JEMURI SERJAN CJ (BORNEO), EDGAR JOSEPH JR AND MOHAMED DZAIDDIN SCJJ

11 AUGUST 1994

Tort *— Negligence — Causation — Agreement on damages — Effect of — Whether causation remains in issue — Whether court could nevertheless decide on causation and quantum — Whether agreement was binding*

C

Civil Procedure *— Appeal — Agreement of counsel on damages in running down action — Whether causation still in issue — Whether trial judge wrong in finding defendant only caused some of injuries — Whether subsequent agreement on damages amounted to waiver of earlier agreement*

D ***Civil Procedure*** *— Pleadings — Necessity for express pleadings — Where defendant seeks to lay blame on third party — Defence of bare denial insufficient*

Civil Procedure *— Parties — Non-joinder of party — Failure to call third party as witness — Whether court could find that third party to blame — Whether breach of natural justice*

E

Evidence *— Burden of proof — Fact especially within knowledge of defendant — Whether defendant bears evidential burden — Prima facie case — Effect of defendant's failure to give evidence — Evidence Act 1950 s 106*

Civil Procedure *— Appeal — Inferences of fact — Interference by appellate court —* F *Inferences against weight of evidence*

The appellant motor cyclist was involved in two collisions. As a result of the first collision with another motor cycle, the appellant fell on the centre of the road and was run over by a motor car driven by the first respondent as servant or agent of the second respondent. G The appellant suffered head and leg injuries and sued the respondents. The rider of the other motor cycle was not cited as a party nor called as a witness. Before the trial, both counsel agreed on general damages of RM150,000 ('the first agreement'). At the trial, the respondents' counsel agreed to the medical reports on the appellant as to their H makers and contents but contended that the appellant's head injury had been caused by the first collision. The trial judge found the first respondent 100% liable for the appellant's leg injuries only and not his head injuries, whereupon both counsel came to a subsequent agreement on general damages of RM10,000 ('the second agreement').

I The appellant appealed against the trial judge's finding on causation and submitted that as the parties had agreed on quantum on the basis of 100% liability in the first agreement, the court should not have interfered to vary it. The respondents, however, contended that the second agreement constituted a waiver of the first agreement.

Held by a majority, allowing the appeal (Mohamed Dzaiddin SCJ dissenting): A

(1) By reason of the first agreement and the agreement on the appellant's medical reports which covered all injuries, the respondents' counsel had represented to the court and to his opponent that causation was no longer in issue. Relying on that B representation, the appellant's counsel was induced to refrain from calling the makers of the medical reports. Therefore, the respondents' counsel was bound by the agreement and should not be allowed to resile from it.

(2) The second agreement was consequential to the judge's finding C on causation and was intended to relieve the judge of the task of assessing damages for the leg injury. It did not amount to a waiver of the first agreement as there was no intention to waive.

(3) The denial of causation in respect of the head injury was not pleaded with sufficient particularity in the respondents' defence. If a defendant seeks to blame a third party, he should plead it D specifically and not merely deny negligence because the plaintiff might otherwise be taken by surprise. In this case, the appellant's counsel had assumed that causation was no longer in issue and was taken by surprise when it was raised.

(4) No explanation was given for the failure to call the rider of the E other motor cycle. There was, therefore, a breach of natural justice when the judge found that the appellant's head injury was the direct result of the first collision as the other motor cyclist never had the opportunity of being heard.

(5) There was no evidence to infer, as a matter of reasonable F probability, that the appellant sustained the head injury from his fall after the first collision. On the contrary, there was evidence that the first respondent had collided into the appellant while he lay on the road and it could be inferred that both the leg and head injuries had been caused by the second collision.

(6) Once the appellant had established that the respondents' car G had collided into him, there was a prima facie case that all injuries were caused by that collision. The evidential burden of proof shifted to the first respondent under s 106 of the Evidence Act 1950 to show that only the leg injury had been caused by him as that was a fact especially within his knowledge. A H defendant is legally entitled to elect not to give evidence but takes that course at his peril. By electing not to give evidence, the respondents had failed to rebut the prima facie case.

(7) The trial judge's finding on causation was therefore against the weight of evidence and, since that finding was not founded on I specific facts but on inferences drawn from admitted or undisputed facts, the decision was reversed.

(8) The court awarded general damages of RM150,000 for all injuries with interest of 8%pa from 25 August 1986 to date of

judgment; RM18,209.40 as pre-trial loss of earnings with interest at 4%pa from the date of accident to date of judgment; RM13,000 as post-trial loss of earnings; RM23,400 as pre-trial nursing care, with interest at 4%pa from the date of accident to date of judgment; and RM12,780 as post-trial nursing care.

Cases referred to

Benmax v Austin Motor Co Ltd [1955] AC 370; [1955] 1 All ER 326; [1955] 2 WLR 418 (folld)
British Railways Board v Herrington [1972] AC 877; [1972] 1 All ER 749; [1972] 2 WLR 537 (folld)
Caswell v Powell Duffryn Associated Collieries Ltd [1940] AC 152 (folld)
Davie v New Merton Board Mills Ltd [1956] 1 All ER 379n; [1956] 1 WLR 233n (folld)
Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99 (folld)
Insurance Commissioner v Joyce (1948) 77 CLR 39 (folld)
Jones v Dunkel (1959) 101 CLR 298 (folld)
Jones v Great Western Railway (1930) 144 LT 194 (folld)
Owners of Swansea Vale v Rice [1912] AC 238 (folld)
R v Burdett (1820) 4 B & Ald 95 (folld)
Watt v Thomas [1947] AC 484; [1947] 1 All ER 582 (refd)

(9) (Per **Mohamed Dzaiddin SCJ** (dissenting)) In running-down cases, it is recognized practice for counsel to agree on quantum or liability before the trial to save time and expense. But, whatever is agreed as damages would still be subject to the question of liability. The onus of proving causation always lies on the plaintiff, and the appellant in this case must prove on the balance of probabilities that it was the first respondent who caused all his injuries.

(10) (Per **Mohamed Dzaiddin SCJ**) The trial judge was correct in finding that the first respondent was responsible only for the injuries to the appellant's leg as there was no evidence which showed that all the appellant's injuries were caused by the first respondent's negligence. The appellant had failed to prove on the balance of probabilities that his other injuries were caused by the first respondent's negligence. Therefore the appeal should be dismissed.

Cases referred to

Government of Malaysia & Ors v Jumat bin Mahmud & Anor [1977] 2 MLJ 103 (folld)
Jones v Great Western Railway (1930) 144 LT 194 (folld)
McGhee v National Coal Board [1972] 3 All ER 1008; [1973] 1 WLR 1 (refd)
Mehmet Dogan Bey v GG Abdeni & Co Ltd [1951] 2 KB 405; [1951] 2 All ER 162 (folld)

Neo Chan Eng v Koh Yong Hoe [1960] MLJ 291 (folld) A
Wilsher v Essex Area Health Authority [1988] 1 All ER 871; [1988] 2 WLR 557 (folld)

[Bahasa Malaysia summary

Perayu, seorang penunggang motosikal, terlibat dalam dua B perlanggaran. Akibat daripada perlanggaran pertama dengan sebuah motosikal lain, perayu terjatuh ke tengah jalan dan dilanggar oleh motokar yang dipandu oleh responden pertama sebagai pekerja atau agen responden kedua. Perayu telah mengalami kecederaan di kepala dan kakinya dan mendakwa responden. Penunggang motosikal lain C tidak dinamakan sebagai suatu pihak dan tidak dipanggil sebagai saksi. Sebelum perbicaraan, kedua-dua peguambela telah mencapai persetujuan tentang ganti rugi am sebanyak RM150,000 ('persetujuan pertama'). Pada perbicaraan, peguambela responden bersetuju tentang laporan-laporan perubatan perayu berkenaan dengan pembuat dan isi kandungan laporan tersebut tetapi menegaskan bahawa kecederaan D pada kepala perayu itu telah disebabkan oleh perlanggaran pertama. Hakim perbicaraan telah memutuskan bahawa responden pertama bertanggungjawab 100% untuk kecederaan pada kaki perayu sahaja dan bukan untuk kecederaan pada kepalanya, maka kedua-dua peguambela telah mencapai persetujuan selanjutnya mengenai ganti rugi am sebanyak RM10,000 ('persetujuan kedua'). E

Perayu telah membuat rayuan terhadap keputusan hakim perbicaraan mengenai penyebaban dan membuat penghujahan bahawa oleh kerana pihak-pihak itu telah bersetuju tentang jumlah ganti rugi atas dasar liabiliti 100% di dalam persetujuan pertama, mahkamah tidak seharusnya bercampur tangan untuk mengubahnya. Responden, F bagaimanapun, menegaskan bahawa persetujuan kedua merupakan suatu penepian persetujuan pertama itu.

Diputuskan oleh majoriti, membenarkan rayuan itu (Mohamed Dzaiddin HMA bertentangan): G

(1) Disebabkan persetujuan pertama dan persetujuan tentang laporan perubatan perayu yang meliputi kesemua kecederannya, peguambela responden telah membuat representasi kepada mahkamah dan peguambela penentangnya bahawa penyebaban tidak lagi dipersoalkan. Bergantung kepada representasi tersebut, peguambela perayu telah didorong supaya tidak memanggil H pembuat laporan perubatan itu. Oleh demikian, peguambela responden diikat oleh persetujuan itu dan tidak seharusnya dibenarkan menarik diri daripadanya.

(2) Persetujuan kedua itu telah akibatkan oleh keputusan hakim mengenai penyebaban dan bertujuan untuk melepaskan hakim I daripada tugas mentaksirkan ganti rugi untuk kecederaan pada kaki perayu itu. Ia tidak merupakan suatu penepian persetujuan pertama kerana tidak terdapat niat untuk mengetepikannya.

(3) Penafian tentang penyebabab berkenaan dengan kecederaan pada kepala perayu itu tidak mengandungi butir-butir yang mencukupi di dalam pembelaan responden. Jika seseorang defendan ingin menyalahkan suatu pihak ketiga, beliau sepatutnya menyatakannya sebagai suatu pli spesifik dan bukan hanya menafikan kecuaian kerana plaintif mungkin terkejut. Di dalam kes ini, peguambela perayu telah menganggap bahawa penyebaban tidak lagi dipersoalkan dan terkejut apabila ia ditimbulkan.

(4) Penjelasan mengenai kegagalan untuk memanggil penunggang motosikal yang lain itu tidak diberikan. Oleh itu, terdapat suatu pelanggaran keadilan asasi apabila hakim telah memutuskan bahawa kecederaan pada kepala perayu adalah suatu akibat langsung daripada perlanggaran pertama kerana penunggang motosikal yang lain itu tidak diberikan peluang untuk didengar.

(5) Tidak terdapat keterangan untuk membuat inferens, sebagai suatu perkara yang mempunyai kebarangkalian yang munasabah, bahawa perayu telah mengalami kecederaan pada kepalanya apabila beliau jatuh selepas perlanggaran pertama. Sebaliknya, terdapat keterangan bahawa responden pertama telah berlanggar dengan perayu semasa beliau terlantar atas jalan dan boleh dibuat inferens bahawa kedua-dua kecederaan pada kaki dan kepalanya adalah akibat perlanggaran kedua itu.

(6) Sebaik sahaja perayu dapat menunjukkan bahawa kereta responden telah berlanggar dengannya, terdapat suatu kes prima facie bahawa semua kecederaan beliau telah diakibatkan oleh perlanggaran tersebut. Beban membukti dari segi keterangan telah beralih kepada responden pertama di bawah s 106 Akta Keterangan 1950 untuk menunjukkan bahawa hanya kecederaan pada kaki perayu telah diakibatkan olehnya kerana itu merupakan suatu fakta yang diketahui khas oleh beliau. Seseorang defendan berhak di sisi undang-undang untuk memilih supaya tidak memberi keterangan tetapi membuat pilihan itu pada risikonya sendiri. Dengan memilih supaya tidak memberi keterangan, responden telah gagal mematahkan kes prima facie itu.

(7) Oleh yang demikian, keputusan hakim perbicaraan mengenai penyebaban adalah bertentangan dengan beratnya keterangan yang ada dan, oleh kerana keputusan itu tidak berdasarkan atas fakta spesifik tetapi atas inferens yang dibuat daripada fakta yang diakui atau tidak dipertikaikan, keputusan itu diakaskan.

(8) Mahkamah telah mengawardkan ganti rugi am sebanyak RM150,000 untuk semua kecederaan dengan faedah 8% setahun dari 25 Ogos 1986 ke tarikh penghakiman; RM18,209.40 untuk kehilangan mata pencarian sebelum perbicaraan dengan faedah 4% setahun dari tarikh kemalangan ke tarikh penghakiman; RM13,000 sebagai kehilangan mata pencarian selepas perbicaraan; RM23,400 untuk jagaan kejururawatan sebelum

perbicaraan, dengan faedah 4% setahun dari tarikh kemalangan ke tarikh penghakiman; dan RM12,780 untuk jagaan kejururawatan selepas perbicaraan.

(9) (Oleh **Mohamed Dzaiddin HMA** (bertentangan)) Di dalam kes perlanggaran, adalah menjadi amalan yang diiktirafkan untuk peguambela mencapai persetujuan tentang jumlah atau liabiliti sebelum perbicaraan untuk menjimatkan masa dan perbelanjaan. Akan tetapi, apa yang dipersetujui sebagai ganti rugi masih tertakluk kepada soal liabiliti. Beban untuk membuktikan penyebaban selalu terletak atas plaintif, dan perayu di dalam kes ini mesti membuktikan atas imbangan kebarangkalian bahawa responden pertamalah yang telah menyebabkan kesemua kecederaannya.

(10) (Oleh **Mohamed Dzaiddin HMA**) Hakim perbicaraan adalah betul dalam keputusannya bahawa responden pertama hanya bertanggungjawab atas kecederaan pada kaki perayu kerana tidak ada keterangan yang menunjukkan bahawa kecuaian responden pertama telah menyebabkan kesemua kecederaan perayu. Perayu telah gagal membuktikan pada imbangan kebarangkalian bahawa kecederaannya yang lain telah disebebkan oleh kecuaian responden pertama. Oleh yang demikian, rayuan itu seharusnya ditolak.]

Notes

For cases on causation, see 12 *Mallal's Digest* (4th Ed) paras 276–278; [1991] Mallal's Digest 1959; [1993] Mallal's Digest 1281.

For cases on the burden of proving facts especially within one's knowledge, see 7 *Mallal's Digest* (4th Ed) para 202; [1992] Mallal's Digest 945.

For cases on appeals against inferences of fact, see 2 *Mallal's Digest* (4th Ed) paras 299–303; [1991] Mallal's Digest 200; [1992] Mallal's Digest 175, 178.

For cases on necessity of express pleadings, see 2 *Mallal's Digest* (4th Ed) paras 1753–1769.

For cases on non-joinder of parties, see 2 *Mallal's Digest* (4th Ed) paras 1635–1636; [1991] Mallal's Digest 334–335.

Complete list of cases referred to

Benmax v Austin Motor Co Ltd [1955] AC 370; [1955] 1 All ER 326; [1955] 2 WLR 418

British Railways Board v Herrington [1972] AC 877; [1972] 1 All ER 749; [1972] 2 WLR 537

Caswell v Powell Duffryn Associated Collieries Ltd [1940] AC 152

Davie v New Merton Board Mills Ltd [1956] 1 All ER 379n; [1956] 1 WLR 233n

Government of Malaysia & Ors v Jumat bin Mahmud & Anor [1977] 2 MLJ 103

Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99

Insurance Commissioner v Joyce (1948) 77 CLR 39
Jones v Dunkel (1959) 101 CLR 298
Jones v Great Western Railway (1930) 144 LT 194
McGhee v National Coal Board [1972] 3 All ER 1008; [1973] 1 WLR 1
Mehmet Dogan Bey v GG Abdeni & Co Ltd [1951] 2 KB 405; [1951] 2 All ER 162
Neo Chan Eng v Koh Yong Hoe [1960] MLJ 291
Owners of Swansea Vale v Rice [1912] AC 238
R v Burdett (1820) 4 B & Ald 95
Watt v Thomas [1947] AC 484; [1947] 1 All ER 582
Wilsher v Essex Area Health Authority [1988] 1 All ER 871; [1988] 2 WLR 557

Legislation referred to

Evidence Act 1950 s 106

Appeal from: Civil Suit No 25–1557–1985 (High Court, Pulau Pinang)

G Sri Ram (*V Sithambaram* with him) (*Kumar, Sitham & Co*) for the appellant.

Bala Mahesan (*Bala Mahesan*) for the respondents.

Cur Adv Vult

Edgar Joseph Jr SCJ (delivering the majority judgment of the court): The undisputed facts underlying this appeal by the plaintiff motor cyclist in a running down case, involving him and a motor car driven by the defendant driver, proceeding in opposite directions, have been sufficiently set out in the dissenting judgment of our learned brother, Mohamed Dzaiddin, which we have had the advantage of reading in draft, and, so, it would be tedious and unnecessary to recapitulate them at any length. Suffice it to say, that what we propose to do is to indicate, with great respect, why we are unable to agree with his evaluation of those undisputed facts and his conclusion that the appeal should be dismissed, thus resulting in the affirmation of the judgment of the trial judge (Abdul Hamid J).

Now, the trial judge had held that although the plaintiff had sustained injuries, to his head and right leg, only the latter injury had been caused as a direct result of the collision involving the plaintiff and the defendant driver's car; the former, that is to say, the far more serious head injury, having been caused as a direct result of a prior collision involving the plaintiff's motor cycle and another motor cycle, the rider of which, we must point out, was never cited as a party or even called as a witness.

In embarking upon a consideration of this appeal, therefore, some degree of repetition as to the course which the proceedings took in the court below and to the undisputed facts, will be inevitable.

Clearly, the judgment of the trial judge is based on the *assumption* that causation was in issue notwithstanding the oral agreement of counsel

before the commencement of the trial that general damages be agreed at RM150,000 (hereinafter referred to as 'the agreement aforesaid' unless the context otherwise requires). A

If, therefore, it could be demonstrated that by reason of the agreement aforesaid, causation was no longer in issue, the only issue remaining being negligence, in the sense of blameworthiness or fault of the defendant driver and/or the plaintiff, which the trial judge had decided in favour of the plaintiff on a 100% basis, then, in our view, as a matter of logic, there could be no foundation for that *assumption* and so the judgment of the trial judge would become vulnerable. B

In his judgment, the trial judge never so much as even mentioned the agreement aforesaid, much less considered and decided its effect. But on appeal, this became a key issue. C

The principal task for us, therefore, regarding this part of the case, is one of construction, that is to say, to determine the meaning and effect of the agreement aforesaid. This in turn calls for a determination of the common intention of counsel for the parties. We venture to suggest that there is a *conclusive* way of testing the rival contentions of counsel before us on this key issue and it is this: D

If counsel for the defendants is correct in his contention before us that causation remained a live issue at the trial despite the agreement aforesaid, why then did not both counsel at the trial agree on the *apportionment* of general damages, more particularly, so much for general damages for the head injury and so much general damages for the leg injury? Instead, they had agreed general damages at RM150,000 and this, obviously, was not just for the injury to the leg but for *all* injuries, *including the head injury*, thereby indicating that causation ceased to be an issue, the only issue remaining being negligence in the sense of blameworthiness or fault of the defendant driver and/or, of the plaintiff. E F

The *subsequent conduct* of the litigation by counsel for the defendants at the trial, in agreeing to the medical reports on the plaintiff 'as to maker and contents', which covered *all* injuries, *including the head injury*, confirms that counsel for the defendants was *representing* to the court and to his opponent, that causation with regard to the head injury, was no longer in issue. G

At this point, we would interpolate to observe, that the orthopaedic surgeon, Mr M Shanmugam, when referring to the history of the plaintiff's injuries, began his report by saying that the plaintiff 'was apparently a motor cyclist who was involved in a collision with a car ...'. The report by the neuro physician, Dr C Bala Ratnam, contains a statement to the like effect. H

Surely, if causation remained an issue, more particularly, if it remained an issue whether the head injury was the direct result of the collision involving the plaintiff and the defendant driver's car or the direct result of a prior collision involving the plaintiff's motor cycle and the other motor cycle, the medical reports would never have been agreed by counsel for the defendants 'as to maker and contents'. I

A As a result of relying on the representation aforesaid of counsel for the defendants, counsel for the plaintiff at the trial was *induced* to refrain from calling the medical witnesses — two from Kuala Lumpur and one from Penang — who we were told had been subpoenaed and were present in court; and whose testimony would have been most material to the issue of causation. In our view, therefore, the agreement aforesaid was binding B on counsel for the defendants and he should not now be allowed to resile from it.

It follows, therefore, that the meaning and effect of the agreement aforesaid having regard to the common intention of the parties, was that causation was no longer in issue when the trial commenced; the *only* C remaining issue being negligence, in the sense of fault or blameworthiness, as between the plaintiff and the defendant driver, which eventually, the judge had decided in favour of the plaintiff on a 100% basis.

But, it was further argued by way of alternative, that as soon as the trial judge had pronounced his decision on the issue of causation in favour D of the defendant driver, counsel on both sides had arrived at a *subsequent agreement*, announced in open court, whereby general damages had been agreed at RM10,000, and that accordingly, this constituted a waiver or vacation of the original agreement (hereinbefore referred to as 'the agreement aforesaid').

E This submission is plainly without merit and therefore quite untenable. It is manifestly clear, that the subsequent agreement was merely consequential on the trial judge's finding that the defendant driver had caused the injury to the plaintiff's leg only but not the injury to his head. By this subsequent agreement, counsel were merely relieving the trial judge of the task of assessing general damages for the leg injury, in view of F his finding on causation. It could not possibly amount to a waiver of the original agreement announced by counsel in open court, before the commencement of the trial, simply because there never was any intention to waive. The situation is analogous to what happens at a criminal trial when the court finds an accused guilty and counsel makes a submission in G mitigation. It is too well known to need citation of authority that such a submission does not preclude an appeal against conviction.

Having regard to our conclusions regarding the construction of the agreement aforesaid and the subsequent agreement, we would, on this ground alone, allow the appeal.

H But, in our view, on two further grounds also, the appeal must succeed.

Putting aside the agreement aforesaid, the *second point* we should like to consider concerns the *pleadings* in the case; more particularly, the defence filed.

I Before us, the primary submission of counsel for the defendants was a denial of causation with regard to the head injury; more particularly, that that injury had been caused as a result of the prior collision involving the plaintiff and the other motor cycle. However, this point was never pleaded with sufficient particularity, as it undoubtedly should have been. The

proper manner of pleading such a point appears in 29 *Atkins* (1976 Issue) at p 62, Form 48, where the precedent says: A

> Further or alternatively the matters complained of were caused wholly by the negligence [and/or breach of statutory duty] of X, Y.

Indeed, if a defendant seeks to avoid liability by blaming a third party, the better practice is for him to plead it specifically instead of merely relying on a denial of negligence because the plaintiff might otherwise be taken by surprise. (See *Davie v New Merton Board Mills Ltd* [1956] 1 All ER 379n; [1956] 1 WLR 233n.) B

This is precisely what happened here. Relying on the agreement aforesaid, counsel for the plaintiff had assumed that causation was no longer in issue, the only issue remaining being negligence in the sense of blameworthiness or fault, and as a result, did not call the medical witnesses whose testimony on causation, as we have already noted, would have been most material. He was thus taken by *surprise* when counsel for the defendants took up the causation point with regard to the head injury — a point which unfortunately commended itself to the judge. C D

The *third point* we should like to consider, may be conveniently described as the *natural justice point.* In our view, it was neither right nor fair to find that the plaintiff's head injury had been caused as a result of the prior collision involving the plaintiff's motor cycle and the other motor cycle, without hearing the rider of the other motor cycle. Indeed, as we have mentioned, at the outset, he was never cited as a party in the suit or even called as a witness, and no explanation had been vouchsafed to the trial court for this glaring omission. There was, therefore, a clear breach of the rule of natural justice embodied in the maxim 'audi alteram partem', when the trial judge had found that the plaintiff's head injury was the direct result of the prior collision with the other motor cycle, considering that the other motor cyclist never had the opportunity of being heard. E F

That would be sufficient to dispose of this appeal in favour of the plaintiff, but having regard to the trial judge's finding — concurred in by our brother, Mohamed Dzaiddin — that upon the evidence adduced at the trial, it could be *inferred* that the plaintiff's head injury had been caused as a result of the plaintiff's falling to the ground, following the prior collision involving the plaintiff's motor cycle and the other motor cycle, we consider it desirable that we express our views regarding this part of the case. G

This finding by the trial judge as to the cause of the plaintiff's head injury, was undoubtedly an inference which he drew from the exculpatory portion of the defendant driver's police report — a self-serving out of court statement, not on oath and not tested by cross-examination — in which no mention was made that he had merely injured the plaintiff's right leg but not the head — and the presence of the imprint of a motor car tyre on the right trouser leg of the plaintiff. H I

When, as here, there is no direct testimony as to how a collision had occurred and the plaintiff is left with no alternative but to rely on inferences, the general guidance given by Lord Loreburn in *Owners of Swansea Vale v Rice* [1912] AC 238 [at p 239], is worth bearing in mind:

A

> What you want is to weigh probabilities, if there be proof of facts sufficient to enable you to have some foothold or ground for comparing and balancing probabilities at their respective value, the one against the other.

In *Jones v Great Western Railway* (1930) 144 LT 194 at p 202, Lord Macmillan explained the meaning of an inference and its effect in
B law, thus: 'An inference in the legal sense is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of proof.'

The question therefore arises, what is a reasonable inference? The answer to this question is provided by Lord Wright in *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at pp 169–170:

C

> Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had actually been observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference
D can be made, the method of inference fails and what is left is mere speculation or conjecture.

In the present case, we are of the view that — in the words of Lord Wright in *Caswell*'s case — there were no objective facts from which it could be inferred, as a matter of reasonable probability, that the plaintiff had
E sustained the head injury as a result of falling to the ground following the prior collision with the other motor cycle. We accept, however, that upon the evidence, it was *possible* that he had sustained the head injury in that way. It was equally possible that he had not. So there was insufficient evidence to connect the head injury with the other motor cycle. In this context, we are reminded of the words of Suffian FJ (as he then was) in
F *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99 at p 103 col 2E–F:

> There was no positive proof, as there was in the *Granby* case (1923) 87 JP 105; 21 LGR 329 that the discharge from the defendant's mine had anything to do with the death of the fish; there was *only a possibility*. (Emphasis
G added.)

With respect, it would, therefore, be a pure conjecture or a mere guess, to say that the plaintiff's head injury had been caused as a result of his falling to the ground following the prior collision with the other motor cycle. And, it is axiomatic that the court is not entitled to guess.

H But, on the contrary, there were objective facts in the shape of the admission in the defendant driver's police report, corroborated by the testimony of two witnesses (PW2 and PW3) — accepted by the trial judge — and who, although not eye witnesses, had arrived on the scene soon after the collision and had seen the plaintiff lying across the white centre
I line with the imprint of a motor car tyre on his right trouser leg, which clearly indicated that the defendant driver's car had, indeed, collided into the plaintiff while he lay on the road.

In the *absence of evidence to the contrary* — and there was none — it could reasonably be inferred from the objective facts aforesaid that *both* the

leg injury and the head injury had been caused by the collision involving the defendant driver's car. The next point to be logically considered in this context is the burden of proof.

It is right to say at the risk of being trite that there is a distinction between the legal burden of proof and the provisional or evidential burden of proof. The distinction is well brought out by the late Mr OC Mazengarb QC, in his highly regarded work entitled *Negligence on the Highway, Law and Practice* (4th Ed) at pp 116 and 117, thus:

> A distinction is drawn between the 'legal burden' of proof which always rests on the plaintiff (or defendant in a cross-suit) and a provisional burden. The former is imposed by the law itself; the latter is a burden which is created by the state of the evidence. A piece of evidence may raise a 'presumption' or a 'prima facie' case in the sense that if nothing more is proved the court may (but not necessarily must) infer that there was negligence and may call upon the other party to answer that piece of evidence. But it is only a provisional burden which may be answered by evidence or by argument. It is not a compelling presumption; it is only a provisional one which may shift from one party to the other and back again as the case proceeds. (See *Brown v Rolls Royce Ltd* [1960] 1 WLR 110).

In our view, regard being had to the circumstances of the case, once the plaintiff had established that he had been struck by the defendant driver's car, while he lay across the white centre line of the road, there was a *prima facie case* that *both* the leg injury and the head injury had been caused by the defendant driver's car.

The provisional or evidential burden of proof, as opposed to the legal burden of proof, which had been raised by the state of the evidence, should then have shifted to the defendant driver to rebut the prima facie case, by showing, if he could, that only the leg injury but not the head injury, had been caused by him, since this was a matter especially within his knowledge. We are supported in this by s 106 of the Evidence Act 1950 (Rev 1974) which provides: 'When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him'.

Nevertheless, the defendant driver, who was present in court and was the only person who had the necessary knowledge to testify as to the causation point, had studiously elected not to give evidence. This omission by the defendant driver to testify should strengthen the inference that could reasonably be drawn from the facts proved by the plaintiff. (See *R v Burdett* (1820) 4 B & Ald 95 at pp 161, 162; *Jones v Dunkel* (1959) 101 CLR 298.)

True it is that a defendant is entirely within his legal rights when he elects not to go into the witness box to give his explanation of the events in question, but in a case which must depend on his credibility, he takes that course *at his peril*. It would be legitimate to ask, 'Why, if the defendant driver's story were true that he did not cause the head injury, did he studiously elect not to go into the witness box?' No explanation for this glaring omission was vouchsafed to the trial judge.

In *British Railways Board v Herrington* [1972] AC 877; [1972] 1 All ER 749; [1972] 2 WLR 537, a House of Lords case, where the defendant called no evidence, Lord Diplock said this ([1972] AC 877 at p 930; [1972] 1 All ER 749 at p 786; [1972] 2 WLR 537 at p 576):

> This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.

Also noteworthy in this context, is what Rich J forcefully said in *Insurance Commissioner v Joyce* (1948) 77 CLR 39 at p 49:

> When circumstances are proved indicating a conclusion that the only party who can give direct evidence of the matter prefers the well of the court to the witness box, a court is entitled to be bold.

The plaintiff himself also did not testify but this was because of the effect of the appalling injury he had sustained to his head — a fact which was agreed at the trial.

It is our firm and considered view that the defendants having through their counsel elected to call no evidence, had clearly failed to rebut the prima facie case established at the close of the case for the plaintiff that *both* the leg injury and the head injury had been caused by the defendant driver's car. Thus, the trial judge's finding on the issue of causation in favour of the defendant driver was against the weight of the evidence. We, therefore, reverse this finding made by him and substitute, in lieu thereof, a finding in favour of the plaintiff. The trial judge, however; was correct in finding the defendant's driver 100% to blame or at fault, for the collision and, indeed, a cross-appeal by the defendants on this issue was withdrawn.

By way of postlude, we must add a final point regarding this part of the case lest we be accused of an oversight. We recognize, as we must, that a Court of Appeal will naturally be reluctant to interfere with a finding of fact by the trial judge who has had the inestimable advantage of watching the demeanour of the witnesses, 'their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial' (per Lord Macmillan in *Watt v Thomas* [1947] AC 484 at pp 490–491; [1947] 1 All ER 582 at p 590). But, having said that, we would draw attention to the familiar principle that there is a distinction between the finding of a specific fact and the finding of a fact which is really an inference drawn from the facts specifically found. In the latter case — and the present case is such a case — the appellate court will be far more ready to reverse his decision founded as it is on inferences drawn from admitted or undisputed facts. (See *Benmax v Austin Motor Co Ltd* [1955] AC 370; [1955] 1 All ER 326; [1955] 2 WLR 418.)

For the various reasons adumbrated above, we would allow this appeal and enter judgment for the plaintiff in the sum of RM150,000 for general damages, to include the head injury, against both the defendants.

For the avoidance of doubt and in order to give full effect to the terms of the agreement aforesaid (particulars whereof appear at p 38 of the

appeal record), which we have found to be binding upon the parties, we make the following consequential awards in favour of the plaintiff: A

(1) interest on the award of general damages of RM150,000 for all injuries, at the rate of 8%pa from 25 August 1986 to date of judgment;

(2) (i) RM18,209.40, being pre-trial loss of earnings, with interest thereon, at 4%pa from 23 June 1984 (the date of accident) to date of judgment; B

(ii) RM13,000, being post-trial loss of earnings, without interest;

(3) (i) RM23,400, being pre-trial nursing care, with interest thereon, at 4%pa from 23 June 1984 to date of judgment; and C

(ii) RM12,780, being post-trial nursing care, without interest.

The judgment of the court below is, to the extent indicated above, varied accordingly.

The defendants must pay to the plaintiff the costs of the appeal and there will be the usual order for refund to the plaintiff of the deposit paid D by way of security for costs.

Mohamed Dzaiddin SCJ (dissenting): This is an appeal by the plaintiff, now the appellant, from the judgment of the High Court Pulau Pinang delivered on 24 April 1991 against an award of damages for injuries E suffered by him as a result of a collision between his motor cycle PV 8249 and motor car PAW 2857 driven by the first defendant as servant or agent of the second defendant along Jalan Raya, Nibong Tebal, Seberang Perai ('the said road') on 23 June 1984.

The trial judge found the first defendant negligent and wholly to blame for causing injuries to the appellant's right leg and awarded him F RM10,000 and RM2,500 as general and special damages, respectively.

The amended statement of claim alleged that at the material time, the plaintiff was lawfully riding his motor cycle along the said road when the first defendant, driving motor car PAW 2857, caused, permitted or allowed the said car to encroach into the plaintiff's lawful path and G collided into him. By a further amendment made in the course of the trial on the 'Particulars of negligence', it was alleged that the said collision was due to the defendant 'causing, permitting or allowing the said motor car to collide into the plaintiff who was lying in the centre of the road'. The first defendant denied that he was guilty of the alleged or any negligence H and averred that the said collision was wholly caused or substantially contributed to by the negligence of the plaintiff. It was further averred that the alleged loss and damages set out in the amended statement of claim was not caused or occasioned by the first defendant's negligence.

The hearing in the court below was only on liability as at the conclusion of PW3's evidence counsel informed the trial judge that they had agreed I on the quantum. In order to appreciate how the argument in the appeal was shaped, it is necessary to examine the judge's notes of proceedings and his grounds of decision. When the trial commenced on 28 March 1991, all

A the bundles of documents were marked and agreed upon by both counsel. Encik Bala Mahesan, counsel for the defendants, agreed that the contents of agreed bundle 'B', the disagreed bundle 'C', and the additional disagreed bundle 'D' be admitted without calling their makers. The learned trial judge then noted that '"B", "C" dan "D" — dipersetujui as to the maker and content'. The court then proceeded to hear and record the evidence B of the plaintiff's witnesses, namely, PW1, PW2 and PW3. At the conclusion of the evidence of PW3, the court adjourned the hearing at the request of both counsel for them to discuss the matter. On resumption, Encik Sithambaram, counsel for the plaintiff, informed the court that both parties had agreed on quantum and closed the plaintiff's case. C Thereupon, Encik Bala Mahesan informed the court that he did not wish to call any evidence even when the first defendant was present, but would proceed to make his submission. I believe this was a necessary consequence of the course which the case took that the learned counsel offered no further evidence which, in my opinion, he was entitled to do so. The trial judge then recorded the agreed quantum on the following terms:

D

Maklumkan:

Quantum yang dipersetujui berdasarkan 100% liabiliti:

(a) Ganti rugi am RM150,000; dan

Faedah 8% setahun mulai 25 Ogos 1986.

E (b) Ganti rugi khas bagi perenggan 8(a)–(g) berjumlah RM2,750.

(c) (i) Kehilangan pendapatan sebelum perbicaraan RM18,209.40 dengan faedah 4% daripada tarikh kemalangan (23 Jun 1984) hingga keputusan; dan

(ii) kehilangan pendapatan selepas perbicaraan sebanyak RM13,000 tanpa faedah.

F

(d) Ganti rugi penjagaan (nursing care):

(i) sebelum perbicaraan RM23,400 dengan faedah 4% dari tarikh kemalangan sehingga keputusan; dan

(ii) selepas perbicaraan RM12,780 tanpa faedah.

G When the case resumed on 29 March 1991, both counsel applied for amendments of their respective pleadings. The plaintiff's amendment was to add under the 'Particulars of Negligence' the words 'lying in the centre of the road'. The court then heard submissions of counsel on liability and adjourned the case for decision to 24 April 1991. On 24 April 1991, the trial judge delivered the following decision. He found the first defendant H 100% liable and the plaintiff not guilty of any contributory negligence. However, he found the liability of the first defendant was only in respect of the plaintiff's leg, ie laceration on skin about 10 cm and fracture of lower ⅓ right tibia/fibula, for which he awarded the plaintiff general damages in the sum of RM10,000 with interest at 8%pa from 25 August I 1986 and special damages of RM2,750 with interest at 4%pa from 23 June 1984 and costs.

In his grounds of decision in Bahasa Melayu, the trial judge gave the following reasons. At the outset, it should be noted that as neither the

plaintiff nor the first defendant gave evidence, the trial judge based his decision on the evidence of the IO (PW1), PW2 and PW3 as well as the mute testimony of the police report, sketch plan and photographs. From the first defendant's police report No 1492/84, which formed the basis of the plaintiff's case, he came to a conclusion that the plaintiff was involved in an earlier collision with another motor cycle before his collision with the first defendant's motor car occurred. According to the police report, both motor cyclists fell on the centre of the road. However, the other motor cyclist managed to pull up. The first defendant stated that as he was then too close to the fallen motor cycle, he could not control his motor car to avoid colliding into the said motor cycle.

Next, the judge accepted the evidence of PW2 and PW3 who stated that on reaching the scene of the accident, they saw the plaintiff lying across the centre of the road. They also noticed a tyre mark on his right trouser leg. From this, he drew an inference that the defendant's car ran over the plaintiff's right leg. The trial judge then reminded himself of the prior collision between the plaintiff's motor cycle and another motor cycle where both motor cycles fell on the road. From this fact, he drew an inference that the plaintiff fell from his motor cycle before his leg was run over by the first defendant's car. He then concluded as follows (at p 16 of the appeal record):

> Tidak terdapat apa-apa keterangan lain yang merujukkan bahawa plaintif 'dilanggar' oleh kereta yang dipandu oleh defendan pertama dan akibatnya plaintif mengalami *semua* kecederaan yang dialaminya. Oleh sebab itu saya berpendapat bahawa, mengikut keterangan yang ada, hanya kecederaan di kaki kanan plaintif sahaja yang boleh dipertanggungjawabkan kepada defendan pertama. (Emphasis provided.)

Literally translated, there was no other evidence which could be inferred that the plaintiff's collision with the first defendant's motor car was the sole cause of all his injuries and loss. In the result, he held the first defendant liable only for the injuries to the plaintiff's right leg.

This appeal was against an award of damages which was argued on the basis that the trial judge, after recording the agreed quantum and having found that it was the first defendant's negligence which caused the plaintiff's injuries and loss, should have awarded damages based on the amount agreed by the parties. Encik Sri Ram submitted that as the parties had agreed on damages on the basis of 100% liability, the court should not have interfered with the issue of quantum and varied it after liability was determined since the defendants, through their counsel, had conceded to the injuries sustained by the plaintiff based on the agreed medical and specialist reports. It was further submitted that because of the compromise reached on the quantum, the plaintiff did not call any medical and expert evidence to show that the injuries which the plaintiff suffered were more consistent by being run over by a motor car as compared to a fall after a collision with another vehicle. According to learned counsel, the judge was wrong when he made his decision on the injuries and damages without referring to or considering the compromise on the damages reached by the parties.

A It must be remembered that in running-down cases, it has been the practice recognized by our courts for counsel representing parties to an action to try and agree on the issue of quantum or liability before the trial with a view to saving time and expense. But, whatever amount is agreed as damages will still be subject to the question of liability as it must be borne B in mind that, in an action for negligence, the issue of damages presupposes that all questions of liability have been decided. Precisely, this was the approach adopted by the trial judge when he proceeded to decide on the issue of liability.

Turning to the issue of liability, the question is whether the first C defendant's act in driving the said motor car caused *all* the injuries and loss suffered by the plaintiff. That, in my view, turns primarily on the question of causation, where the onus of proving it always lies on the plaintiff. Here, the plaintiff must prove on a balance of probabilities that it was the first defendant who caused all his injuries (*Neo Chan Eng v Koh Yong Hoe* D [1960] MLJ 291; *Government of Malaysia & Ors v Jumat bin Mahmud & Anor* [1977] 2 MLJ 103). In *Wilsher v Essex Area Health Authority* [1988] 1 All ER 871; [1988] 2 WLR 557, the House of Lords had occasion to re-examine the question of causation in the light of an earlier House of Lords decision in *McGhee v National Coal Board* [1972] 3 All ER 1008; [1973] 1 E WLR 1. According to Lord Bridge, *McGhee*'s case lays down no new rule and does not challenge the basic proposition that the burden of proof of causation lies upon the plaintiff. His Lordship then continued ([1988] 1 All ER 871 at p 881–882; [1988] 2 WLR 557 at p 569):

> On the contrary, it affirmed the principle that the onus of proving causation F lies on the pursuer or plaintiff. Adopting a robust and pragmatic approach to the undisputed primary facts of the case, the majority concluded that it was a legitimate inference of fact that the defenders' negligence had materially contributed to the pursuer's injury. The decision, in my opinion, is of no greater significance than that and the attempt to extract from it some esoteric principle which in some way modifies, as a matter of law, the nature G of the burden of proof of causation which a plaintiff ... must discharge once he has established a relevant breach of duty is a fruitless one.

It is a question of fact whether any particular head of damage is so caused by a defendant's negligence or breach of statutory duty (per McNair J in *Mehmet Dogan Bey v GG Abdeni & Co Ltd* [1951] 2 KB 405 at p 411; H [1951] 2 All ER 162 at p 166). Further, it must be remembered that:

> Whatever evidence is so-called, it must stand to show how the accident happened and how, as a result, he sustained his personal injuries or suffered his damage. Such evidence also must show that, on a balance of probabilities, the most likely cause of the damage was the negligence ... by the defendant, his servant or agent and not solely the negligence ... of some other person. I If he fails to establish that the defendant caused the harm, of which he complains, or some part of it, then his action will fail. Such a failure will result, whether this happens to be expressed in terms of lack of causation or for reasons of remoteness. (Charlesworth and Percy on *Negligence* (8th Ed, 1990) at para 5–32).

Applying the above principles of causation, can it be said that the trial judge was justified in his finding that the first defendant was liable only for causing the injuries to the plaintiff's right leg and not *all* other injuries? It would appear to me from the evidence before him, the trial judge made two crucial findings of fact. First, based on the first defendant's police report, which he stated as forming the basis of the plaintiff's case, the trial judge found the plaintiff was involved in a collision with another motor cycle before the first defendant's motor car collided into him. From this, he drew an inference that the plaintiff fell from his motor cycle before his right leg was run over by the first defendant's motor car . Secondly, he accepted the evidence of PW2 and PW3 that they saw the plaintiff lying across the white centre line. They noticed tyre mark of a motor car of about one foot wide on the plaintiff's right trouser leg. From this, the trial judge drew yet another inference that it was the first defendant's motor car which ran over the plaintiff's right leg.

In my opinion, looking at the available evidence, bearing in mind that neither the plaintiff nor the first defendant gave evidence, his Lordship had drawn correct inferences from those facts. 'An inference in the legal sense is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof' (per Lord Macmillan in *Jones v Great Western Railway* (1930) 144 LT 194 at p 202). Finally, based on the above finding, the trial judge concluded that the first defendant was responsible only for the injuries to the plaintiff's right leg as there was no other evidence which showed that all the plaintiff's injuries were caused by the defendant's negligence.

On my part and in my considered opinion, the trial judge was correct in his finding. There was no evidence to suggest that all other injuries sustained by the plaintiff were caused by or the direct result of the collision between the plaintiff and the first defendant's motor car . It would be a matter of conjecture if we were to hold that the brain injury was the direct result of the first defendant's negligence when the trial judge had come to his conclusion that there was no other evidence which showed that the first defendant was responsible for all the injuries suffered by the plaintiff. From the evidence as found by the trial judge, the plaintiff's brain injury would appear to be more consistent with his falling from his motor cycle as a result of the collision with the other motor cycle rather than due to his right leg being run over by the first defendant's motor car . In the final analysis, it is my conclusion that the plaintiff has failed to prove, on a balance of probabilities, that his other injuries, aside from the leg injury, were caused by the first defendant's negligence in driving his motor car PAW 2857 on the said road at the material time. Accordingly, I would dismiss this appeal with costs.

Appeal allowed.

Reported by Prof Ahmad Ibrahim